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How a 'Never Trump' Covington Partner Won, Then Lost, Lucrative ZTE Monitorship

A draft press release showed Secretary Wilbur Ross praising Covington & Burling's Peter Lichtenbaum, who was picked as the ZTE special compliance coordinator. Commerce quickly rescinded the offer after discovering his statements critical of the candidacy of Donald Trump.

By C. Ryan Barber | February 04, 2019

Last year, on the afternoon of Aug. 16, the deal was sealed. The U.S. Commerce Department had picked Peter Lichtenbaum, a Washington-based partner at the law firm **Covington & Burling** (<https://www.law.com/law-firm-profile/?id=69&name=Covington>), for a coveted role serving as the special compliance coordinator overseeing the Chinese telecom giant ZTE Corp.



Wilbur Ross, U.S. commerce secretary.
Photo: Andrew Harrer/Bloomberg

Lichtenbaum told a Commerce official in an email that day he was “honored” to be selected. The compliance monitor would have unprecedented access across a company in the crosshairs of U.S. national security and trade officials over its record of violating sanctions against Iran and North Korea and its desire not to be shut out of U.S. markets.

All that was left was the public announcement. In a **draft press release** (<https://drive.google.com/file/d/1FOccw0-RMzQAfOk-0V1MWlAl4vq4kjS1/view>) the agency planned to issue the next day, Commerce Secretary Wilbur Ross said Lichtenbaum’s “wealth of experience is critical for holding ZTE accountable.” Lichtenbaum received permission for Covington to make its own announcement, timed to appear after Commerce issued its statement.

“As you will see, it is quite brief and links to Commerce’s announcement,” Lichtenbaum wrote in an email, referring to a draft of Covington’s press release. “We expect to receive a number of media inquiries after the announcement and would like to be able to refer them to this statement.”

Neither media release ever went out.

Instead, on the day Lichtenbaum expected his new role to be publicized, at least two Commerce officials compiled an extensive collection of news articles that identified the veteran trade and sanctions lawyer as one of the Republican signatories on a “Never Trump” letter in 2016, according to public records obtained by The National Law Journal.

The following week, the Commerce Department announced that Roscoe Howard, a **Barnes & Thornburg** (<https://www.law.com/law-firm-profile?id=25&name=Barnes-%26-Thornburg-LLP>) partner who’d previously served as U.S. attorney in Washington, would serve as the ZTE compliance monitor.

The previously unreported internal records, obtained through a Freedom of Information Act request, provide new details surrounding the Commerce Department’s decision to rescind the selection of Lichtenbaum after learning about his criticism of then-presidential candidate Donald Trump.

The records show just how close Commerce came to announcing Lichtenbaum as the ZTE compliance coordinator, a position that comes with a 10-year term and the promise of millions of dollars in revenue. Reuters first **reported** (https://at.law.com/ukG4Qk?cmp=share_twitter) last year the offer was rescinded after Ross learned Lichtenbaum signed a “Never Trump” letter that raised questions about the presidential candidate’s fitness for the White House.

Commerce provided only a fraction of its records related to the Lichtenbaum saga. Citing various exemptions under the Freedom of Information Act, the agency said it was withholding hundreds of pages from public disclosure. The agency pointed to provisions in the law that can shield information to protect personal privacy; documents that reflect government deliberations; and commercial information.

The documents released to the NLJ do not identify the official who initiated the last-minute research of Lichtenbaum’s public statement, nor do they reveal whether or how much Covington and Lichtenbaum pushed back against the agency’s decision. A spokesperson for the Commerce Department declined to answer a list of questions from the NLJ, saying only that Howard was the “secretary’s final decision.”

The Commerce Department’s reneging on its offer to Lichtenbaum raised broad questions about whether the Trump administration had violated the lawyer’s free-speech rights. No lawsuit was ever filed, and the episode faded from headlines.

Lichtenbaum declined to comment for this story, as did Covington & Burling.

‘Exceptionally well-versed in export controls’

The ZTE special compliance coordinator was created as part of a settlement last June between Commerce and the Chinese telecommunications company. ZTE agreed to pay a \$1 billion fine to resolve allegations it misled American officials about its conduct in the aftermath of an **earlier settlement** (<https://www.law.com/nationallawjournal/almID/1202781930082/zte-corp-pleads-guilty-to-violating-iran-trade-sanctions/>) involving claims the company violated U.S. sanctions against Iran and North Korea.

Lichtenbaum, co-chairman of Covington's international trade and finance practice, had interviewed in the summer to serve as the compliance monitor, and other firms—including Barnes & Thornburg, where Howard has worked **since 2015** (<https://www.btlaw.com/insights/news/2015/former-us-attorney-joins-barnes-thornburgs-litigation-department-in-washington-dc>)—were also in the running.

Competition for compliance monitorships is often fierce. Big law firms and consultant shops tout the expertise and resources they can bring to compliance roles, which reward firms millions of dollars in addition to national publicity. Compliance monitors, often working closely with federal prosecutors and other agency officials, are tasked with overseeing a company's adherence to settlement terms.

ZTE is required to pay for its compliance monitor. The Commerce Department planned to review ZTE's contract with Barnes & Thornburg before it was "completed or executed." A dollar amount has not been publicized.



Peter Lichtenbaum. File 2005. Photo: US National Archives

Lichtenbaum's background in sanctions and international trade law made him an impressive candidate to serve as the compliance coordinator. Under the George W. Bush administration, he served as the assistant secretary for export administration and

acting under secretary in the Commerce Department's Bureau of Industry and Security. Lichtenbaum **joined** (<https://legaltimes.typepad.com/blt/2010/08/covington-lands-bae-systems-incs-top-compliance-officer.html>) Covington in 2010 from the defense contractor BAE Systems Inc., where he served as vice president for regulatory compliance and international policy.

Lichtenbaum had assembled a team of prominent Covington lawyers to work with him as the ZTE monitor, according to the Commerce records. Those senior team members would have included Mythili Raman, a partner and former head of the criminal division at the Justice Department; Addison Thompson, a white-collar special counsel; and Eric Carlson, a partner in the white-collar defense and investigations practice.

Over the summer, Lichtenbaum engaged with Commerce officials as they narrowed their search for the ZTE monitor, the public records show. Lichtenbaum formally accepted the monitorship role Aug. 16.

Leadership in the Commerce Department's Bureau of Industry and Security, directing the search for the ZTE monitor, "will be pleased to hear that you have accepted the position; we all look forward to working with you in the weeks and months to come," Karen NiesVogel, director of the office of exporter services, wrote in an email that day to Lichtenbaum.

"Today's appointment is the continuation of the harsh penalties imposed on ZTE by the Department of Commerce," Ross said in a draft press release that Commerce was prepared to post Aug. 17. "Mr. Lichtenbaum is exceptionally well-versed in export controls, having worked within government, as well as helping those in the private sector to navigate it."

Within 24 hours of Lichtenbaum's acceptance, Commerce officials pieced together what was described in the records as "info of possible interest," including links to news coverage on the "Never Trump" **letter** (<https://www.nytimes.com/interactive/2016/08/08/us/politics/national-security-letter-trump.html>).

Which agency official initiated the investigation, and the scope of its participants, remains unclear from the records Commerce released. The documents, which included emails, revealed at least two Commerce officials compiled links to media clips and other appearances showing Lichtenbaum was no fan of Trump's candidacy. Officials scoured Google for videos, and they reviewed social media accounts. The records do not indicate to whom the links were sent.

"From a foreign policy perspective, Donald Trump is not qualified to be president and commander-in-chief," the "Never Trump" letter said. "Indeed, we are convinced that he would be a dangerous president and would put at risk our country's national security and well-being."

Other signatories included John Bellinger III of **Arnold & Porter Kaye Scholer** (<https://www.law.com/law-firm-profile/?id=15&name=Arnold-%26-Porter>); Donald Ayer, a former deputy U.S. attorney general who is now of counsel at **Jones Day** (<https://www.law.com/law-firm-profile?id=163&name=Jones-Day>); Larry Thompson, a former deputy U.S. attorney general now at Finch McCranie; and Kenneth Wainstein, a former U.S. attorney in Washington who is a partner at **Davis Polk & Wardwell** (<https://www.law.com/law-firm-profile?id=77&name=Davis-Polk>).

The Commerce officials also found an Australian television news segment featuring an interview of Lichtenbaum from the rooftop of Covington's downtown Washington office. "The U.S. is the indispensable leader of the free world and we simply don't have confidence in Mr. Trump's ability to perform the functions that the president must perform in the U.S. system," Lichtenbaum said in the 2016 interview.

The public records disclosure also showed Commerce searched for records about Howard that might pose any "risk," a descriptor that Commerce officials used next to certain links. Howard was among the former government lawyers who signed letter objecting to the Trump administration's embrace of family separations at the U.S.-Mexico border. A Commerce official designated the link as "high risk."



Roscoe C. Howard, Jr. File: 2007. Photo: Diego M. Radzinski/NLJ

Howard, a well-known white-collar defender in Washington, served as the U.S. attorney for the District of Columbia from 2001 to 2004. Barnes & Thornburg told Commerce that the firm would dedicate 18 employees to the ZTE monitoring, including four staff members specialize in export controls. Howard declined to comment Monday.

Howard accepted the ZTE compliance monitor post Aug. 24 at 11:31 a.m., the Commerce records show. Minutes later, at 11:45 a.m. that Friday morning, NiesVogel emailed Lichtenbaum on behalf of Dan Hill, the acting under secretary for industry and security, with what appears to have been a letter formally rescinding his selection. Commerce did not provide a copy of the letter.

A news release from Commerce announcing Howard's selection went out the same day.

"Today's appointment is the continuation of the unprecedented measures imposed on ZTE by the Department of Commerce," Ross said in a **statement** (<https://www.commerce.gov/news/press-releases/2018/08/us-department-commerce-announces-selection-zte-special-compliance>) announcing his pick. "Mr.

Howard is exceptionally well-versed in corporate compliance, having tried more than 100 cases as a federal prosecutor, as well as helping those in the private sector on compliance and ethics issues."

'An Enormous and Obvious Coercive Effect'

For more than two decades, a U.S. Supreme Court decision has bolstered the free speech rights for contractors, affording them legal protections against retribution over criticism of government officials.

In 1995, a lawyer in the U.S. solicitor's office named Beth Brinkmann rose to greet the justices of the U.S. Supreme Court. Brinkmann was arguing as an amicus party in a First Amendment case involving Keen Umbehr, a trash-hauler in rural Kansas who alleged that county commissioners retaliated against him over his criticism of the local government.

"I think it's important to focus on that question on the other side of the issue here, and that's the First Amendment speech that's at issue here. This is speech that lies at the core of the First Amendment," Brinkmann, now an appellate partner at Covington & Burling, told the justices. "It's speech on matters of public concern, and often contractors are in a unique position to have information and to have an informed opinion about government functioning because of their relationship with the government."

The Supreme Court **ruled**

(<https://supreme.justia.com/cases/federal/us/518/668/#tab-opinion-1959933>) 7-2 in favor of speech protections for government contractors in the case *Board of County Commissioners, Wabaunsee County, Kansas, v. Umbehr*.

Umbehr was represented by his brother-in-law, Robert Van Kirk, who was then a lawyer in the White House counsel's office and received permission to argue the case in his personal capacity. Now a partner at **Williams & Connolly** (<https://www.law.com/law-firm-profile/?id=326&name=Williams-%26-Connolly-LLP>), Van Kirk, co-chair of the firm's complex commercial litigation and securities litigation groups, said the Supreme Court decision made clear that "the government can't use its economic leverage to either punish or silence its critics."

Van Kirk said the Commerce Department's decision to rescind its selection of Lichtenbaum "on its face is a clear violation of the First Amendment and the principles laid down in *Umbehr*."

"Monitorships are significant financial arrangements. They typically are multi-year projects involving millions of dollars," Van Kirk said in an interview. "Revoking a contract of this kind based solely on the viewpoints the monitor expressed has an enormous and obvious coercive effect."

Van Kirk said it is not surprising for contractors to shy away from mounting challenges to hiring decisions they view as politically motivated.

"This type of retaliation is particularly pernicious because the victims may not pursue a remedy out of concern about additional negative repercussions if they seek to vindicate their rights," Van Kirk said. "As a result, they end up self-censoring, which is precisely the vice the First Amendment was designed to remedy."

Read more:

Covington Partner Is Denied ZTE Monitorship Over 'Never Trump' Letter
(https://at.law.com/ukG4Qk?cmp=share_twitter)

The Curious Case of Joe Lieberman's Work as a Lobbyist Who Isn't 'Advocating'
(https://at.law.com/dUyW1D?cmp=share_twitter)

DOJ's New Compliance Monitor Guidance Accounts for 'Burdens' on Companies
(https://at.law.com/JQR2KT?cmp=share_twitter)

Hogan Lovells Lobbying Team Went to Bat for ZTE in Sanctions Row
(https://at.law.com/QhwxQb?cmp=share_twitter)

US to Lift Export Ban on China's ZTE, Embed 'Compliance Coordinators'
(<https://www.law.com/nationallawjournal/2018/06/07/u-s-to-lift-export-ban-on-chinas-zte-corp-embed-compliance-coordinators/>)

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